

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

Jurisdiction

The jurisdiction of this Court is involved on the grounds set forth under the heading "Jurisdiction" in the petition.

Statement of the Case

A statement of the material facts in this case is set forth in the petition.

Specification of Errors

(1) The Court of Appeals of the State of New York erred in holding that the order and judgment of sale of the District Court of Tulsa County and the judgment and mandate of the Supreme Court of Oklahoma, in the *Bowden and Valerius action*, were entitled to full faith and credit in the Courts of the State of New York, under Article IV, Section 1 of the Constitution of the United States, as against the claim of lack of jurisdiction and lack of due process of law advanced in the New York Courts by petitioners.

(2) The Court of Appeals erred in not holding that petitioners, as plaintiffs in that Court, were entitled to have all "jurisdictional facts fully developed at a trial, and not summarily disposed of on a motion before answer", as pointed out by the dissenting judges of the Appellate Division (R., Vol. VII, fol. 10964).

(3) The Court of Appeals erred in holding that said judgments and mandate of the Oklahoma Courts were not

void as having been rendered in a proceeding of which said courts did not and could not have jurisdiction of the subject matter.

(4) The Court of Appeals erred in holding that petitioners were not deprived of their property by said judgments and mandate of the Oklahoma courts, without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

(5) The Court of Appeals erred in holding that the appeal of petitioners to said Court did not involve a substantial constitutional question.

(6) The Court of Appeals erred in holding that the judgments and mandate of the Oklahoma courts constituted a bar to the prosecution of this action in the courts of New York.

(7) The Court of Appeals erred in affirming the order and judgment of the Supreme Court, New York County, and of the Appellate Division, First Department, dismissing the amended complaint herein on the merits.

Argument

The facts set forth in the petition show that the judgment of the Oklahoma Courts, which has been held by the New York Courts to be a bar to the present action, was rendered in a proceeding which was in fact an action by a judgment-debtor against his judgment-creditors to have the judgment against himself, sold to himself, for a negligible consideration. It is the contention of petitioners that no court has jurisdiction of a proceeding of this nature and that consequently the judgment of sale of the District Court of Tulsa County, approving the sale, and the mandate of the Supreme Court of Oklahoma rein-

stating the order of sale, are absolute nullities and can have no force or effect in any other state under the due process of law clause.

The principles governing the giving of full faith and credit in one state to the judgment of a sister state are too well settled to need extended restatement. This Court has held repeatedly that lack of jurisdiction of the subject matter of the action will preclude the giving of full faith and credit to the judgment of another state. Furthermore no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law required by the Constitution of the United States.

Hansberry v. Lee, 311 U. S. 32;

Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 273;

Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 815;

United States v. Throckmorton, 98 U. S. 61, 65.

In *Old Wayne Mutual Life Assn. v. McDonough*, *supra*, this Court said, at page 15:

“The constitutional requirement that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State is necessarily to be interpreted in connection with other provisions of the Constitution, and therefore no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law. No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party. *Scott v. McNeal*, 154 U. S. 34, 46.”

Also, when the judgment of one court according to another court the binding force and effect of *res adjudicata*

cata is challenged for want of due process of law, it becomes the duty of such Court and likewise of this Court, to examine the procedure in both litigations.

Thus this Court in *Hansberry v. Lee, supra*, said at page 40:

"State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under State constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a State court, ascribing to the judgment of another court the binding force and effect of *res judicata* is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in **both litigations** to ascertain whether the litigant whose right has been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 273."

In the case at bar petitioners challenge the binding effect of the Oklahoma judgment on their cause of action in New York for the reason that that judgment was rendered in a proceeding over which the Oklahoma courts did not and could not have jurisdiction. A valid judgment constitutes the exercise of judicial power. Judicial power as that term is understood in our fundamental law applies only to the determination of justiciable controversies between parties. The cause of action must be *bona fide*. *Muskrat v. United States*, 219 U. S. 346. Jurisdiction does not extend to the determination of suits in which there is no valid subject matter.

Thus it was said by this Court in the case of *Lord v. Veazie*, 8 How. 251, in speaking of a judgment rendered in a collusive suit, at pages 255-256:

"A judgment entered under such circumstances and for such purposes, is a mere form. * * * a judgment

in form, thus procured, in the eye of the law is no judgment of the Court. It is a nullity, and no writ of errors will lie upon it."

And in the case of *Hatfield v. King*, 184 U. S. 162 at pages 165-166, this Court said:

"If it be true, as claimed by some of the many parties, that this is a collusive suit, that there is no **real controversy** between the plaintiff and defendants, that the plaintiff has been controlling the litigation on both sides with a view of obtaining an opinion on a matter of law in which he is interested, the transaction is one which, as stated, courts of justice have always reprehended, and should be treated as a punishable contempt, and no decree entered under those circumstances should be permitted to stand."

It is submitted that a suit by a *judgment debtor* against his judgment creditors to relieve himself of the obligations of the judgment is a proceeding unknown to the law, and is as wanting in a justiciable subject matter, as was held in the *Veazie* case.

It is plain that this was the true nature of the *Bowden and Valerius* suit in the District Court of Tulsa County. A valid judgment was outstanding against Davis in the Oklahoma court. Davis lived in New York. The owners of the judgment were a group of former stockholders of the dissolved corporation, Davis Malecona Company. Davis got an opinion from Schwabe, an attorney of Tulsa, Oklahoma, as to how to dispose of the judgment (R. Vol. II, pp. 1075-1086). Davis agreed to furnish all money necessary for prosecuting a fictitious suit in the names of dummies in order to obtain the satisfaction on the judgment (R. Vol. III, fols. 4458-4460; p. 1118). Bowden and Valerius with money furnished by Davis, the judgment debtor, purchased 290 shares of the preferred stock of Davis Malecona Company. This stock, when purchased,

in fact and in law belonged to the judgment debtor. It was purchased for a fraudulent and fictitious purpose.

Based upon their nominal ownership of this stock Bowden and Valerius instituted an action in the District Court of Tulsa County asking for the sale of this judgment. In the petition it was alleged that

"this action is filed and presented for and on behalf of these plaintiffs and all others interested as co-owners of said judgment and entitled to participate in the proceeds arising from the liquidation thereof" (R. Vol. II, pp. 946-947).

In truth and in fact, however, said action was not filed, presented or prosecuted in behalf of the nominal plaintiffs and all others interested as co-owners of said judgment. On the contrary, it was filed and prosecuted in behalf of the judgment debtor and its purpose was not to benefit the owners of the judgment, but to enable the judgment debtor to purchase and satisfy the judgment for his own unlawful purpose.

That this was the admitted nature of the action is shown by the opinion letter of George B. Schwabe dated September 30, 1936 (R. Vol. II, pp. 1075-1086), in which the very steps which ultimately were taken were outlined in advance by Schwabe for the purpose of relieving Davis of his obligations under the judgment.

That the subject matter of the *Bowden and Valerius* action was one of which no court could take jurisdiction will be seen by disregarding the nominal ownership of the preferred stock by the plaintiffs and substituting in their place, the real owner, Davis, the judgment-debtor.

Did Davis the judgment-debtor have any cause of action which at the time in question he was able to enforce in his own name as judgment-debtor? That is the only question in this case. Did the Tulsa Court have juris-

dition, on a petition by Davis to appoint a receiver of the judgment, with power to sell or dispose of the same to the nominee of the judgment-debtor for the purchase of enabling him to obtain its satisfaction? If not, then that Court could not do indirectly, that which it could not do directly.

It was as said by Judge Hurst in his sharp dissent in the Supreme Court of Oklahoma:

"In the present case the deception practiced was cleverly screened by following an apparently adversary legal procedure, such as making the stockholders parties defendant, giving notice of the order to show cause, and the appointment of a receiver to sell the stock, which gave an additional appearance of fairness and good faith to the proceeding. But the court should look to the substance, not to the form. I cannot escape the conclusion that the proceeding resulting in the sale of this judgment was from its inception designed to, and did, perpetrate a fraud upon the court in which it was brought, and upon the stockholders who owned the judgment. From the purchase of stock by the agents of Davis, in order that they might, as apparently bona fide stockholders request that the judgment be sold, down to the consummation of their fraudulent purpose, every move made in the proceeding, and all the evidence produced by them, was made and done to conceal their real purpose, and to impose upon the court and the stockholders. No such deception or fraud as that contained in the record in the instant case was present in the cases relied upon in the majority opinion, on which the first syllabus is predicated.

"This cause had its beginning in 1924 in breach of trust and embezzlement and its ending in 1937 in deception, concealment and perjury. It is my view that courts of justice have no higher duty than to see to it that parties guilty of such conduct do not profit thereby. I regret to see this court render a decision that permits Davis to profit by his fraudulent scheme" (R., Vol. I, fols. 1656-1668).

There is only one answer to the proposition so presented, and that is that such a proceeding is one utterly unknown to the law.

A judgment-debtor has only one obligation, namely to pay his adjudicated obligation to his judgment-creditors. It was therefore the legal duty of this judgment-debtor to perform the obligations imposed on him by the judgment in accordance with its terms. Until he did so he had no rights whatever against his judgment-creditors. Then he was entitled to a satisfaction of the judgment. This judgment-debtor certainly did not have the right, while the judgment was unpaid, to have it sold or disposed of for his benefit, in order to obtain its satisfaction.

Any proceeding by the judgment-debtor to accomplish that object did not have a justiciable subject matter, and any judgment or decree of a court which attempted or purported to give any such relief was a nullity.

This is the general law of the land, known as due process of law. It could hardly be contended, if Davis himself had been the plaintiff in the Tulsa action, that the judgment of sale of the District Court of Tulsa County would be entitled to full faith or credit in the courts of another state, or that the mandate of the Supreme Court of Oklahoma reinstating such order or judgment of sale could have had any greater force or effect.

It is submitted that, because the paid agents of Davis were the nominal plaintiffs, the judgment of the Oklahoma Court has no further or greater validity. There is the same lack of a justiciable subject matter of the action; the same lack of jurisdiction to make a binding determination, as if Davis, the judgment-debtor, had been the plaintiff. Hence when the true nature of the action was brought to the knowledge of the Oklahoma Courts, the only course open to them was to refuse to make any determination because of lack of jurisdiction, and if such

courts did attempt to make a determination that was not a binding judicial act, but mere form, of no force or effect anywhere when examined in the light of the constitutional requirement of due process of law.

The only way that Davis succeeded in bringing his fictitious litigation before the Tulsa Court was by having the suit brought in the name of his paid agents and dummies, upon the false allegation that the suit was instituted and would be prosecuted for the benefit of all the co-owners of the judgment. It will hardly be contended that, if there was no jurisdiction in the Court to entertain a suit by Davis, the judgment debtor, against his judgment creditors, to have the judgment sold or disposed of, then also there was no jurisdiction if the suit was brought in the names of paid agents and containing false jurisdictional allegations.

Jurisdiction is a question of substance and not of form, and if the Oklahoma courts did not have jurisdiction to hear and determine a suit brought by Davis himself against his judgment creditors, then they did not acquire jurisdiction if the suit was brought in the name of paid agents of the judgment debtor. If in fact there is no justiciable controversy between the parties, such a controversy is not created by changing the form or by filing false and fictitious pleadings. That would make a court of justice an agency for determining fictitious and elusive disputes, and for perpetrating frauds, a proposition abhorrent to all conceptions of law and equity.

If there was no jurisdiction of the subject matter permitting the District Court of Tulsa County to make the order then there was no jurisdiction of the subject matter in the Supreme Court of Oklahoma permitting it to reinstate the order after it had been vacated for fraud.

It will be noted that Judge Williams, as soon as the charge was made that Davis was the real party in interest in the *Bowden and Valerius* intervention proceeding, held

a hearing for the purpose of determining the facts. If he had found that Davis was the real party in interest the lack of jurisdiction in the Court to make any determination disposing of the judgment would have been plain. That the real facts were withheld from the Court by the giving of untrue and false testimony on the hearing in the intervention proceeding (R., Vol. II, pp. 889-924), certainly could not give it jurisdiction.

It may be argued that the Supreme Court of Oklahoma has held in this case that it is the law of that state that a judgment debtor may through his paid agents sue his judgment creditors in the courts of that state to have the judgment sold for his benefit, and that although this is not the law of other states, the judgment of the Oklahoma Court is nevertheless entitled to full faith and credit in other states, under the full faith and credit clause of the Constitution. That in fact, is what Leary, J., and the other New York Courts held.

However, that is not the law, once the full faith and credit clause of the Constitution (Fourteenth Amendment) is invoked.

Hansberry v. Lee, 311 U. S. 32;
Fauntelroy v. Lunn, 210 U. S. 230.

Such argument completely overlooks the qualification which exists to the full faith and credit clause, namely, that any judgment for which full faith and credit is claimed must be rendered in accordance with due process of law, as that term is defined by the fundamental law of the land and as expressly required by the Fourteenth Amendment.

It certainly is not due process of law for one state to permit a judgment debtor residing in another State, to come into its courts through and in the name of his paid agents and, under the guise of protecting the interests

of the judgment creditors, to deprive them of their property in the judgment for the benefit of the judgment debtor. Whether this be the law of Oklahoma, that state cannot complain if her sister states are not obligated to give full faith and credit to her judgments carrying out such a baneful law. In any event, the due process of law clause in the Constitution of the United States is to the contrary.

It was not the intention of the framers of the Constitution that each state should give full faith and credit to every judgment of another state unless such judgment be rendered in accordance with accepted principles of jurisprudence.

In the case at bar it is clear that the decision of the Supreme Court of Oklahoma lays down a doctrine which is repugnant to every conception of law and justice. It approves a suit by a judgment debtor against his judgment creditors to deprive them of their rights in the judgment which they own. It condones the bringing of such suit in the name of paid agents, thereby concealing the interest of the judgment debtor therein, and of presenting false allegations to the effect that the suit was brought for their benefit and protection, when in truth and fact it was brought solely for the benefit of the judgment debtor and against the interests of the judgment creditors.

The New York courts have seen fit to give effect to the judgment of the Oklahoma Courts and to treat it as a bar to an action in New York to compel the judgment debtor to perform his obligations under the judgment validly entered against him. Petitioners now ask this Court to review this action of the New York Courts and to determine whether such decision is in accordance with the supreme law of the land.

It is respectfully submitted that it is not.

Hansberry v. Lee, 311 U. S. 32.

Conclusion

The Courts of Oklahoma by a supposed order of sale, judgment and mandate, rendered in a proceeding by a judgment debtor against his judgment creditors to dispose of the judgment for his benefit, a proceeding which furnished no justiciable subject matter of a suit by these or any other Courts, have disposed of petitioners' property in the Davis judgment.

The courts of New York have failed to give relief, holding that they were bound under Article IV, Section 1 of the Constitution of the United States, to give full faith and credit to these alleged judicial proceedings of the Courts of Oklahoma. The result has been that these petitioners have been deprived of their property in the Davis judgment without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. This writ of certiorari should be granted to the end that this Court may review the actions of the Courts of Oklahoma and of New York, and that the present judgment of dismissal against these petitioners may be reversed.

The petition for certiorari should be granted.

Respectfully submitted,

ORVILLE C. SANBORN,
Counsel for Petitioners.

LESLIE J. TOMPKINS,
GEORGE E. REYNOLDS,
RICHARD S. HOLMES,
Of Counsel.